Ozburn-Hessey Logistics, LLC *and* United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers a/k/a United Steel Workers Union. Case 15–CA–165554

August 24, 2018

DECISION AND ORDER

BY MEMBERS PEARCE, KAPLAN, AND EMANUEL

On September 22, 2016, Administrative Law Judge Ira Sandron issued the attached decision. The General Counsel filed exceptions and a supporting brief, and the Respondent filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings,[1] findings,[2] and conclusions only to the extent consistent with this Decision and Order.[3]

In the absence of exceptions, we adopt the judge's finding that the Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally changing its attendance policy in October 2013 without affording the Union notice or the opportunity to bargain. For the reasons explained below, however, we reverse the judge and find that the Respondent's subsequent unilateral change to the new October 2013 policy, and its discharge of employee Jermaine Brown pursuant to that additional change, also violated Section 8(a)(5) and (1).

[1] We find no merit in the General Counsel's exception to the judge's denial of his motion to amend the complaint to allege that the Respondent unlawfully changed the attendance policy for probationary employees.

[2] The General Counsel has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[3] We have amended the judge's conclusions of law and remedy consistent with our findings herein. We shall modify the judge's recommended Order to conform to our findings and to the Board's standard remedial language, and we shall substitute a new notice to conform to the Order as modified.

The "2-Hour Rule" and the Discharge of Jermaine Brown

A. Background

At all relevant times, the Respondent's attendance policies provided that employees received "points" for various attendance infractions and that employees accruing 13 points in any 52-week period would be subject to discharge. In mid-October 2013, the Respondent unilaterally implemented a new attendance policy without providing the Union notice and an opportunity to bargain.[4] The new policy was more lenient than the prior one in its treatment of employees who left work early. Under the prior policy, employees who left work early would receive three points for each infraction; under the new policy, they would receive only one point. The Respondent announced the new policy in meetings in October 2013 and disseminated it in writing (hereinafter "new written policy") at the same time.

At some time after October 2013, the Respondent unilaterally modified its new written policy so that employees who left work before they had worked 2 hours would receive two attendance points instead of one (the modification is referred to by the judge as the "2-hour rule").[5] The 2-hour rule was not incorporated into the Respondent's new written policy, nor did the Respondent notify employees contemporaneously about the change.[6] On September 3, 2014, Regional Human Resources Manager Lisa Johnson sent an email to other managers stating that they "MUST also make it clear" to employees the number of points they would be assessed for leaving early. She stated, "If the employee works for at least 2 hours, then the employee will receive 1 point for leaving early. If the employee leaves before working a full 2 hours, then the employee will receive 2 points." There is no evidence that this message was communicated to employees at that time, either by Johnson or by other managers in response to her email.

[4] The events of this case occurred at a time when the Respondent was challenging the certification of the Union as the bargaining representative of the unit of the Respondent's employees at issue here. See *Ozburn-Hessey Logistics, LLC,* 362 NLRB No. 118 (2015), enfd. 833 F.3d 210 (D.C. Cir. 2016).

[5] The judge did not make a finding as to when the rule was implemented and announced to employees, except that it occurred after October 2013. On exceptions, the General Counsel asserts that the judge erred in failing to find that the "2-hour rule" was unilaterally implemented at the same time as the rest of the October 2013 policy changes but was not communicated to employees until much later. Based on his credibility determinations, however, the judge expressly rejected this view of the evidence and found that the 2-hour rule was a subsequent unilateral change. Because we find no basis to overrule his credibility determinations, we rely on his factual findings herein.

[6] As of the date of the hearing, the change had still not been incorporated into the new written policy.

On October 15, 2014, employee Jermaine Brown received a written attendance warning that included four points for leaving early on July 28 and October 10, 2014. Brown protested that he should have received only one point for each time he left early, per the new written policy. He raised this issue with the Respondent's Director of Operations Chris Brawley. In November 2014, Brawley informed employees in a meeting that, to receive just one point for leaving early, they had to work at least 2 hours. If they left before that, they would receive two points. Several employees told him that was "not right" because, under the new written policy, employees leaving early were to accrue only one point.

On July 1, 2015, after arriving late to work, Brown was discharged for having 13 total attendance points, including the 4 points that he received for leaving early on July 28 and October 10, 2014.

The General Counsel alleged in the complaint that "[a]bout October 1, 2013, Respondent, for attendance violations . . . changed the number of attendance points charged; and . . . changed the circumstances under which attendance points are charged" without giving the Union notice and an opportunity to bargain, in violation of Section 8(a)(5) and (1). The General Counsel further alleged that these changes resulted in Brown's discharge, also violating Section 8(a)(5) and (1).

B. Discussion

The judge found that the October 2013 new written policy change violated Section 8(a)(5) and (1), but dismissed the unlawful discharge allegation. He found that the 2-hour rule applied to Brown was implemented after October 2013 and therefore amounted to a second independent change to the Respondent's attendance policy. However, the judge found that, because the General Counsel had failed to allege specifically that the Respondent had unlawfully made a second change to the policy, any determination regarding the legality of Brown's discharge had to be based on "the policy before and after the mid-October 2013 change, not whether any later unilateral modifications of that change worked to [Brown's] detriment."

The General Counsel has excepted to the judge's finding, and we find merit in the exception. To begin, we disagree with the judge's conclusion that the legality of the Respondent's unilateral implementation of the 2-hour rule could not be reached because it was not specifically alleged in the complaint. Applying *Pergament United Sales*, 296 NLRB 333, 334 (1989), enfd. 920 F.2d 130 (2d Cir. 1990), we find no infringement of the Respondent's due process rights in holding that the implementation of the 2-hour rule and its application to Brown were unlawful. It is well established that "the Board may find and remedy a violation even in the absence of a specified allegation in the complaint if the issue is closely connected to the subject matter of the complaint and has been fully litigated." Id. (citations omitted). Both criteria are met here.

First, it is apparent that the 2-hour rule is closely connected to the subject matter of the complaint and arises from the same set of facts as the October 2013 written policy change. Second, the Respondent's announcement and implementation of the 2-hour rule and its application to Brown were fully and fairly litigated at the hearing. Indeed, the Respondent knew that those issues would be litigated well in advance. On March 1, 2016, 3 months before the hearing, the General Counsel informed counsel for the Respondent by email that the unilateral change at issue was the change to the attendance policy in October 2013, "including the later decision to assess two attendance points to employees who leave work within the first two hours of the employees' shift." He further stated that, if there was a hearing, "the General Counsel would argue that all employees who were disciplined or discharged pursuant to the unilaterally implemented attendance policy, most specifically those employees who were assessed two points for leaving early within the first two hours of a shift" would be entitled to have such discipline or discharges rescinded.[7]

At the hearing, Human Resources Director Shannon Miles and Regional Human Resources Manager Johnson, who were both involved in the rollout of the October 2013 attendance policy, testified about the implementation and timing of the 2-hour rule. Miles testified that it was her decision to implement it. Two Directors of Operations also testified about the 2-hour rule. In addition, Director of Operations Brawley and Johnson, who discharged Brown, testified about the rule and its application to Brown. The Respondent also had the opportunity to cross-examine the General Counsel's witnesses about the rollout of the attendance policy, including the 2-hour rule. In light of this testimony and the Respondent's communications with the General Counsel, there is no indication that the Respondent would have altered its litigation strategy had the 2-hour rule been specifically identified in the complaint.

As to the merits, the Respondent does not dispute that it unilaterally implemented the 2-hour rule without providing the Union notice or an opportunity to bargain and admits that it discharged Brown pursuant to that rule. Accordingly, we find that the Respondent violated Sec-

[7] The judge initially rejected the exhibit containing the above email exchange but later relied on it when noting that the General Counsel informed the Respondent that the change in attendance points for leaving early was an issue to be litigated.

tion 8(a)(5) and (1) by unilaterally announcing and implementing the 2-hour rule, and that it further violated the Act by discharging Brown in reliance on that unlawful rule.[8]

AMENDED CONCLUSIONS OF LAW

Substitute the following paragraph for Conclusion of Law 3:

"3. By the following conduct, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act and violated Section 8(a)(5) and (1) of the Act:

(a) Unilaterally announcing and implementing changes in the number of points assessed for employees leaving work early without first having afforded the Union notice and an opportunity to bargain.

(b) Discharging Jermaine Brown on July 1, 2015, pursuant to its unlawful unilateral changes to the number of attendance points assessed for employees leaving work early."

AMENDED REMEDY

Having found that the Respondent engaged in certain unfair labor practices, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Specifically, having found that the Respondent violated Section 8(a)(5) and (1) by discharging Jermaine Brown pursuant to unlawful unilateral changes to the number of attendance points assessed for employees leaving work early, we shall order it to offer him full reinstatement to his former job, or if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed, and make him whole for any loss of earnings and other benefits. The Respondent will also be required to remove from its files any reference to Brown's unlawful termination, and to notify him in writing that this has been done and that the termination will not be used against him in any way.

Backpay shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010). As set forth in *AdvoServ of New Jersey, Inc.*, 363 NLRB No. 143 (2016), the Respondent will also be required to compensate Brown for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and to file with the Regional Director for Region 15, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar years. In addition, pursuant to *King Soopers, Inc.*, 364 NLRB No. 93 (2016), enfd. in rel. part 859 F.3d 23 (D.C. Cir. 2017), the Respondent shall further compensate Brown for his search-for-work and interim employment expenses regardless of whether those expenses exceed interim earnings. Search-for-work and interim employment expenses shall be calculated separately from taxable net backpay, with interest at the rate prescribed in *New Horizons*, above, compounded daily as prescribed in *Kentucky River Medical Center*, above.

ORDER

The Respondent, Ozburn-Hessey Logistics, LLC, Memphis, Tennessee, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Changing the terms and conditions of employment of its unit employees without first notifying United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers a/k/a United Steel Workers Union (the Union) and giving it an opportunity to bargain.

(b) Discharging or otherwise disciplining employees based on unlawful unilateral changes made to the terms and conditions of employment of the unit employees.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Before implementing any changes in wages, hours, or other terms and conditions of employment of unit employees, notify and, on request, bargain with the Union as the exclusive bargaining representative of employees in the following bargaining unit:

> All full-time custodians, customer service representatives, senior customer service representatives, cycle

[8] We recognize the seeming inconsistency in finding that Brown was unlawfully discharged because he acted in reliance on one unlawful change (the new written policy) that benefitted him but was discharged pursuant to a later unlawful change (the 2-hour rule) that did not. However, this is a dilemma of the Respondent's own making. Having unlawfully implemented the new written policy in October 2013, the Respondent in effect created a new status quo, upon which Brown understandably relied. The Respondent acted at its own peril in creating the new written policy; therefore, it cannot rely on the pre-October 2013 attendance policy to assert that Brown would have been discharged even in the absence of the Respondent's unlawful implementation of the 2-hour rule. Furthermore, "the focus of the analysis of a discharge alleged to constitute a refusal to bargain in violation of Sec[.] 8(a)(5) must be on the injury to the union's status as bargaining representative." *Great Western Produce*, 299 NLRB 1004, 1005 (1990), overruled on other grounds by *Anheuser-Busch, Inc.*, 351 NLRB 644 (2007). That status is harmed each time an unlawfully changed term or condition of employment is applied. Id.

counters, inventory specialists, maintenance, maintenance techs, material handlers, operators 1, operators 2, operators 3, quality assurance coordinators, returns clerks, and team leads employed at [its six Memphis, Tennessee facilities]; excluding all other employees, including office clerical and professional employees, guards, and supervisors as defined in the Act.

(b) Upon the Union's request, rescind the unlawful changes to the number of attendance points assessed for employees leaving work early.

(c) Within 14 days from the date of this Order, offer Jermaine Brown full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

(d) Make Jermaine Brown whole for any loss of earnings and other benefits suffered as a result of the unlawful unilateral changes, in the manner set forth in the amended remedy section of this decision.

(e) Compensate Jermaine Brown for the adverse tax consequences, if any, of receiving a lump sum backpay award, and file with the Regional Director for Region 15, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar years.

(f) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharge, and within 3 days thereafter, notify Jermaine Brown in writing that this has been done and that the discharge will not be used against him in any way.

(g) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(h) Within 14 days after service by the Region, post at its facilities in Memphis, Tennessee, copies of the attached notice marked "Appendix."[9] Copies of the notice, on forms provided by the Regional Director for Region 15, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since October 14, 2013.

(i) Within 21 days after service by the Region, file with the Regional Director for Region 15 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. August 24, 2018

Mark Gaston Pearce, Member

Marvin E. Kaplan, Member

William J. Emanuel, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

[9] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Choose not to engage in any of these protected activities.

WE WILL NOT change your terms and conditions of employment without first notifying United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers a/k/a United Steel Workers Union (the Union) and giving it an opportunity to bargain.

WE WILL NOT discharge or otherwise discipline any of you based on unlawful unilateral changes made to your terms and conditions of employment.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL, before implementing any changes in wages, hours, or other terms and conditions of employment of unit employees, notify and, on request, bargain with the Union as the exclusive collective-bargaining representative of our employees in the following bargaining unit:

> All full-time custodians, customer service representatives, senior customer service representatives, cycle counters, inventory specialists, maintenance, maintenance techs, material handlers, operators 1, operators 2, operators 3, quality assurance coordinators, returns clerks, and team leads employed at [its six Memphis, Tennessee facilities]; excluding all other employees, including office clerical and professional employees, guards, and supervisors as defined in the Act.

WE WILL, upon the Union's request, rescind the unlawful changes to the number of attendance points that you are assessed for leaving work early.

WE WILL, within 14 days from the date of the Board's Order, offer Jermaine Brown full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

WE WILL make Jermaine Brown whole for any loss of earnings and other benefits resulting from his discharge, less any net interim earnings, plus interest, and WE WILL also make him whole for reasonable search-for-work and interim employment expenses, plus interest.

WE WILL compensate Jermaine Brown for the adverse tax consequences, if any, of receiving a lump sum backpay award, and WE WILL file with the Regional Director for Region 15, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar years.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharge, and WE WILL, within 3 days thereafter, notify him in writing that this has been done and that the discharge will not be used against him in any way.

OZBURN-HESSEY LOGISTICS, LLC

The Board's decision can be found at www.nlrb.gov/case/15-CA-165554 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

William T. Hearne, Esq., for the General Counsel.
Ben H. Bodzy and *Stephen D. Goodwin, Esqs. (Baker, Donelson, Bearman, Caldwell & Berkowitz, PC),* for the Respondent.
Benjamin Brandon, for the Charging Party.

DECISION

STATEMENT OF THE CASE

IRA SANDRON, Administrative Law Judge. The complaint arises from unfair labor practice (ULP) charges that United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers a/k/a United Steel Workers Union (the Union) filed against Ozburn-Hessey Logistics, LLC (the Respondent), alleging violations of Section 8(a)(5) and (1) of the National Labor Relations Act (the Act) at the Respondent's Memphis, Tennessee facilities.

Pursuant to notice, I conducted a trial in Memphis, Tennessee, on July 6 and 7, 2016, at which the parties had full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence. The General Counsel and the Respondent filed helpful posthearing briefs that I have duly considered.

Issues

1. Did the Respondent in mid-October 2013, following an election but prior to the Union's certification, violate Section 8(a)(5) and (1) by admittedly unilaterally announcing and implementing a change in the number of attendance points assessed for employees leaving work early?

2. Should the General Counsel be permitted to amend the complaint to add the allegation that in mid-October 2013, the Respondent announced and implemented another undisputed unilateral change in attendance policy, i.e., reducing the number of points required to discharge probationary employees?

3. Was Jermaine Brown discharged on July 1, 2015, because the Respondent relied on attendance points that he received as a result of the unilateral change in assessing leave early points?

The General Counsel does not dispute that Brown committed the attendance violations for which he was assessed points, or contend that his discharge was due to any protected activity on his part or the result of disparate treatment for an improper motive. The Respondent's sole basis for the discharge was his attendance record

Witnesses and Credibility

Witness titles are given as of the relevant time period.

The General Counsel's witnesses included Brown; Benjamin Brandon, international organizer for the Union; and Troy Hughlett, a current employee with whom Brown worked on the Fiskars F.A.S.T. Gerber Legendary Blades (Fiskars) account in the building located at 5510 East Holmes Road (the 5510 building).

The Respondent called Shannon Miles, senior manager of human resources (HR) for the southern region, including the Memphis facilities; Lisa Johnson, regional HR manager for the Memphis facilities; Kenneth (Chris) Brawley and Kyle Perkins, directors of operations for the 5510 building at different times; and Verdia Jones, Brown's supervisor. The Respondent also called Brandon and Richard Rouco, the Union's attorney, as adverse witnesses under Section 611(c).[1]

At the outset, I note the well-established precept that a witness may be found partially credible; the mere fact that the witness is discredited on one point does not automatically mean that he or she must be discredited in all respects. *Golden Hours Convalescent Hospitals,* 182 NLRB 796, 799 (1970). Rather, a witness' testimony is appropriately weighed with the evidence as a whole and evaluated for plausibility. Id. at 798–799; see also *MEMC Electronic Materials,* 342 NLRB 1172, 1183 fn. 13 (2004), quoting *Americare Pine Lodge Nursing,* 325 NLRB 98, 98 fn. 1 (1997), enf. granted in part, denied in part, 164 F.3d 867 (4th Cir. 1999); *Excel Container,* 325 NLRB 17, 17 fn. 1 (1997). As Chief Judge Learned Hand stated in *NLRB v. Universal Camera Corp.,* 179 F.2d 749, 754 (2nd Cir. 1950), regarding witness testimony, "[N]othing is more common in all kinds of judicial decisions than to believe some and not all."

Credibility in this case is germane to the issue of whether the Respondent, after mid-October 2013, further changed the attendance policy in the assessment of points for leaving early. More specifically, witnesses of the Respondent averred that in mid-October 2013, when Johnson distributed written changes to the attendance policy that included changing 3 attendance points for leaving early to one point, she orally stated that henceforth leaving early up to 2 hours into the shift would result in two points, and after 2 hours would result in one point. To the contrary, Brown and Hughlett testified that they first learned of this "2-hour rule" in 2014.

Regardless, the General Counsel does not allege any changes after mid-October 2013 as additional violations. Although the timing of the announcement and implementation of the 2-hour rule does not affect my ultimate conclusions in this case, I will address credibility in the event that a reviewing authority deems credibility resolution on the issue material.

For the following reasons, I credit Brown and Hughlett. As to Hughlett, I take into account that "'the testimony of current employees which contradicts statements of their supervisors is likely to be particularly reliable because these witnesses are testifying adversely to their pecuniary interest.'" *PPG Aerospace Industries, Inc.,* 355 NLRB 103, 104 (2010), quoting *Flexsteel Industries,* 316 NLRB 745, 745 (1995), enfd. mem. 83 F.3d 419 (5th Cir. 1996). Thus, current employee status may serve as a "significant factor," among others, on which reliance can be placed in resolving credibility issues. *Avenue Care & Rehabilitation Center,* 360 NLRB 152, 152 fn. 2 (2014); *Flexsteel,* ibid. Moreover, Hughlett appeared candid, and he answered questions on direct and cross-examination without any discernible attempt to slant his answers for or against the Respondent. I therefore conclude that he was a reliable witness.

Brown also struck me as sincere and as not embellishing or exaggerating his testimony to further his case. He did get confused at times as to the sequence of events and when he first learned of the change in attendance policy to one point for leave early. However, he did provide well-detailed, unequivocal accounts of his various conversations with Jones and other representatives of management; and his testimony with regard to when employees learned of the 2-hour rule and when he first spoke to Brandon, was consistent with that of Hughlett and Brandon, respectively.

The Respondent's admitted failure to document in any way any 2-hour rule prior to when it purportedly was announced to employees in mid-October 2013 is extremely suspicious. Indeed, the first document of record in which the 2-hour rule was articulated was an email of September 3, 2014, from Johnson to Memphis management (GC Exh. 21).

Thus, Miles testified as followed. In October 2013, Corporate Vice President Andrew Tidwell approved changes in the employee handbook and in attendance policies, which affected approximately 8000 hourly employees nationwide. One of the stated changes was that leave early would now be assessed one attendance point instead of three. Miles had authority over approximately 40–45 facilities throughout the southern United States. According to Miles, over the weekend prior to October 14, 2013, she made the decision on her own to add the 2-hour rule to the new attendance policy, in response to a question from Manager Johnson about how to treat an employee who worked only 5 minutes before leaving. She informed Johnson of this when the latter called her on Monday morning, October 14, 2013, prior to Johnson's first meeting with employees on the new attendance policy. However, inexplicably, Shannon did absolutely nothing to memoralize in writing what she had stated to Johnson, and she took no steps whatsoever to convey this in writing to other HR managers.

Shannon's explanation that it would have been too much trouble to make the change in writing and that Tidwell told her,

[1] Rouco testified by telephone by agreement of all parties.

"It's gone out; just make sure everybody talks about it,"[2] was unconvincing. She had prior email communications with HR managers about the new attendance policy and very easily could have sent out an email to them advising them of her decision to modify the new leave early provision. Yet, Shannon, an experienced HR professional with responsibility over 40–45 locations, failed to put anything in writing concerning her purported change to the new written policy. Equally unexplainable is that Tidwell issued nothing in writing on a national basis to announce such a 2-hour rule even though the new attendance policy applied to all hourly employees across the country. I find this wholly incredulous.

I also credit Hughlett's testimony, over Brawley's, as follows. When Brawley told Fiskars employees at a meeting in approximately early November 2014 that they had to work at least 2 hours to receive one point instead of two, Hughlett and a couple of other employees protested that was not right because the handbook stated that leaving early was one point. They would not have said that in November 2014 had such a policy been made clear to them in mid-October 2013.

In sum, I do not believe management's witnesses that as of October 2013 the Respondent adopted the 2-hour rule and announced it to employees.

Similarly, I credit Brown and Hughlett where their testimony diverged from Supervisor Jones, who was frequently vague, nonresponsive and/or evasive in her answers. Moreover, certain aspects of her testimony made no sense. Thus, she testified that when she told Brown on October 15, 2014, to come to her office after work, he did not ask why, and she gave no reason. However, she could not recall if he showed her the written attendance policy prior to his coming to her office. And, despite her testimony that she earlier said nothing about the reason, she further testified that when he came to her office, she said, "[O]kay, I think you know what this is all about," and he said, "Yes."[3] In the absence of evidence that Brown was clairvoyant, I do not accept this as credible. Nor do I credit her testimony that she and Brown had no discussion of the attendance policy at their meeting in her office that day.

Further, her testimony was confusing, to the point of incoherence, on how and why the subject of the 2-hour rule arose at the October 16, 2013 meeting on the new attendance policy that Johnson conducted with Fiskars employees:

> "[I]f the question came up, everybody—the question came up. When she first said, when she was first explaining it to them, the same way you just read it [1 point in the written document], the question came up. So that's when she went back, and she thoroughly explained it to them, to all of us, exactly what it meant in detail.[4]

Facts

Based on the entire record, including the pleadings, testimony of witnesses and my observations of their demeanor, documents, and the parties' stipulations, I find the facts as follows.

The Respondent is a limited liability company with an office and places of business in Memphis, Tennessee, where it is engaged in providing transportation, warehousing, and logistic services. The Respondent admits jurisdiction as alleged in the complaint, and I so find. The Respondent employs about 8,000 hourly employees nationwide.

On July 27, 2011, a representation election was conducted among the Respondent's employees in the following unit:

> All fulltime custodians, customer service representatives, senior customer service representatives, cycle counters, inventory specialists, maintenance, maintenance techs, material handlers, operators 1, operators 2, operators 3, quality assurance coordinators, returns clerks, and team leads employed at [six Memphis, Tennessee facilities, including the 5510 building]; excluding all other employees, including office clerical and professional employees, guards, and supervisors as defined in the Act.

The tally was 165 votes for the Union, 164 against, with 14 challenged ballots. Subsequently, both the Respondent and the Union filed objections to each other's preelection conduct. Judge Robert A. Ringler addressed these challenges and objections, as well as ULP charges that the Union had filed against the Respondent, in his decision of May 15, 2012. The Board, in 359 NLRB 1025 (2013), affirmed his findings that the Respondent had committed a number of ULPs and engaged in objectionable preelection conduct, and it adopted his order that the Regional Director open and count six of the challenged ballots: if the Union was designated by a majority of the votes counted, a certification of representative would issue; if not, the July 27, 2011 election would be set aside and a new election would be conducted when a fair and free election could be held.

On May 14, 2013, the Regional Director issued a revised tally of ballots, with 169 votes for the Union, and 166 against; and 10 days later, the Acting Regional Director issued a certification of representative.

Following the Supreme Court's decision in *NLRB v. Noel Canning, et al.,* 134 S.Ct. 2550 (2014), the Board, on June 27, 2014, set aside its May 2, 2013 decision (2014 WL 2929772). On November 17, 2014, in 361 NLRB 921 (2014), the Board reaffirmed that decision and, in light of the revised tally of ballots, certified the Union as the collective-bargaining representative of unit employees.

In a subsequent refusal-to-bargain case, *Ozburn-Hessey Logistics, LLC,* 362 NLRB No. 118 (2015), enfd. –F.3d – 2016 WL 4409353 (D.C. Cir. Aug. 19, 2016),[5] the Board granted the General Counsel's motion for summary judgment, rejecting any arguments that the Respondent made concerning issues that were or could have been litigated in the prior representation proceeding.

The Respondent's answer raised affirmative defenses contesting the validity of the certification. See also Tr. 24–25. However, the Respondent's brief does not renew any such ar-

[2] Tr. 375.

[3] Tr. 243.

[4] Tr. 255–256.

[5] The General Counsel on September 12, 2016, filed a motion that I take judicial notice of the court's decision. but I need not decide whether such decision is an "adjudicative fact" within the meaning of Federal Rules of Evidence Rule 201. See 150 A.L.R. Fed. 543 §6[a] (originally published in 1998).

gument, which I therefore consider withdrawn.

Building 5510 and the Fiskars Account

Building 5510, a warehouse, services four primary accounts, including Fiskars. Employees are generally assigned to one account, although they may be called to work on others if the need arises. Johnson's HR department is located near the break room in the upstairs of the building. Building 5540 is located on the same premises.

At all times material, there were approximately 30 Fiskars employees. Each morning, Supervisor Jones held a daily startup or preshift meeting with them in the Fiskars account receiving area, to go over the day's agenda.

The Attendance Policy prior to October 2013

The attendance policy in effect before the October 2013 changes was the revised policy of February 1, 2011.[6] It provided a system of imposition of disciplinary points for absenteeism and tardiness, with leaving early from work without the supervisor's approval being assigned three points. No distinction was made between regular and probationary employees. It also set out a schedule for progressive discipline, to be evaluated over a 52-week rolling basis (points were excised after 1 year of their accrual): (1) a written warning for four points; (2) a second written warning for eight points; (3) a final written warning for 12 points; and (4) termination for 13 combined points within a 52-week rolling period.

The mid-October 2013 Announcement and Changes

Prior to September 30, 2013, the Respondent's corporate headquarters made the decision to make certain changes in the employee handbook and in the attendance policy, for all hourly employees, effective October 1. Miles stated in an email of September 30 to various members of management,[7] that the most significant changes included:

> (1) Employees would receive only one point for a "leave early";
> (2) Employees would be allowed to leave messages, text or email, etc. when calling out for a shift if preapproved by their supervisor; and
> (3) An introductory period was being added to the policy: during the first 90 days of employment, an employee who accumulated six points could be terminated for excessive absenteeism.

During the week of October 14, 2013, Johnson held special mandatory meetings with buildings 5510 and 5540 full-time employees on changes in the attendance policy and in the employee handbook.[8] The meeting with Fiskars employees was held on October 16 in the upstairs break room. Employees were provided with the new attendance policy that contained the above changes, and signed an acknowledgment that they had received it.[9]

The Respondent did not provide the Union with prior notice of the announcement and implementation of the changes or, therefore, an opportunity to bargain over them.

For reasons earlier stated, I discredit the Respondent's witnesses' testimony that Johnson articulated the 2-hour rule at these meetings, noting in particular the Respondent's failure to provide any written documentation whatsoever showing that a 2-hour rule was adopted in mid-October 2013. I therefore credit Brown and Hughlett and find that as far as leave early, Johnson stated only that henceforth employees would receive one point rather than three as per the new written policy.

On September 3, 2014, almost a year later, Johnson sent an email to Memphis management regarding the attendance policy.[10] Therein, she stated, "You MUST also make it clear by stating to that employee the number of points they will receive for leaving work," bold-faced the 2-hour rule, and then asked, "Am I clear?" She marked the email as "importance high."

Brown's Employment

Brown, initially a temporary employee referred by an employment agency, became a full-time regular employee on April 22, 2013, and received the attendance policy then in effect. He was always assigned to the Fiskars account and responsible for putting on bar codes and price tags and assembling cases that would go out to stores. At times, he was assigned work for customers other than Fiskars.

At about 9:30 a.m. on October 15, 2014, Jones came to Brown's workstation and told him to come to her office after work. Later that morning, he went to her desk in the Fiskars work area and asked what was going on. She replied that Johnson in HR had told her that she had to give him four points for leaving early on two occasions (on July 28 and October 10, 2014). He asked for permission to see Johnson, which she gave him.

Immediately afterward, Brown went to Johnson's office in HR. He asked what was going on with the points and why he was receiving two points rather than one for leave early. She replied, that was stated at a meeting in the break room. He responded that he did not remember that. She produced the acknowledgment that he had signed on October 16, 2013. Brown pointed out that the policy clearly stated one point for leaving early without permission. She read the absence line (which states two points for "[a]n employee's failure to report to work as scheduled after missing over two hours of the workday."). He asked for permission to see Phil Smith, director of operations, and she gave it.

On the way to Smith's office in the 5540 building, Brown encountered Smith in the parking lot and showed him the policy stating one point for leave early. Smith responded that the policy did not say two points but that was what it meant. Brown then returned to Johnson's office and asked if she was really going to give him four points instead of two for leaving early, and she replied that she had to. Immediately after that, he encountered Smith in the break room adjourning the HR office. He stated that it made no sense that an employee received two points for leaving early, but an employee who failed to come to work at all also received two points. Smith did not verbally respond. At approximately 11 a.m., Brown returned to

[6] GC Exh. 6.
[7] GC Exh. 16 at 3.
[8] R. Exh. 4.
[9] GC Exh. 7; R. Exh. 1 (Brown's acknowledgment).
[10] GC Exh. 21.

Jones' desk and showed her the policy, repeating what he had said to Smith and stating that he would fight it. She responded that she did not see any reason why he should not.

After the end of the workday, at about 4:50 p.m., Brown went to Jones' office, where she handed him a second written warning for attendance, for nine combined points, including four for 1.75 hours early leave on July 28 and November 10, 2014.[11] He refused to sign it.

About 10 days later, Brown encountered Director of Operations Brawley, who had recently assumed that position. Brown explained that he had received two points for leaving early, but the policy stated that it should have been one. Brawley replied that he would look into it and get back to him.

In approximately early November 2014, Brawley spoke to Fiskars employees on the subject of the 2-hour policy, in conjunction with a regular morning startup meeting. Brawley stated that an employee had to stay over 2 hours—2 hours and 1 minute—in order to receive just one point; otherwise, it was two points for leave early. Hughlett and a couple of other employees responded that was not right because the policy said leave early was one point, to which Brawley did not respond.

Immediately after the meeting, Brown approached Brawley and stated that he could not let the issue go and had to find somebody with whom to address it. Brawley replied fine, that he could take it up with the Union or the EEOC.

On December 12, 2014, Jones presented Brown with a final written warning for having 13 combined points, including the four points for July 28 and October 10, 2014; and on April 27, 2015, she issued him a final written warning for having 12 combined points, again including the four points for July 28 and October 10, 2014.[12] Brown refused to sign either one, stating on both that he disputed receiving two points instead of one for his arriving late on those dates.

On July 1, 2015, Brown was terminated for having 13 combined points, including the four points for July 28 and October 10, 2014.[13] That morning, he arrived late after being delayed en route because of a traffic accident. He was called to the HR office at about 10:15 a.m. and met with Manager Jim Windisch, Brawley, and Johnson. Brawley went over his points and said that they were going to have to let him go. Brown stated that he had thought about taking the issue of the two points for leaving early to the Union but had not because he thought that they were going to reconsider. Windisch responded that they were not going to talk about that, but Brown could take it up with the U.S. Government if he wanted. Johnson handed him his separation papers.

According to both Brown and Brandon, Brown called him in July 2015 and informed him that he had been terminated because the Company had changed the absentee policy. Brandon was not aware before then of any changes in the attendance policy made after the election, and he first saw the actual mid-October 2013 policy on the first day of the hearing.[14] Brandon works out of Birmingham, Alabama, and is principally involved in organizing campaigns in various states. After the election and the Respondent contested the Union's representational status, Brandon had little contact with unit employees, and no shop stewards operated at the facility.

Analysis and Conclusions

I. Did the Respondent in mid-October 2013, after the election but before the Union was certified, violate Section 8(a)(5) and (1) by unilaterally announcing and implementing a change in the assessment of attendance points for employees leaving early from work?

An employer violates Section 8(a)(5) and (1) of the Act by unilaterally making substantial changes on subjects of mandatory bargaining; to wit, employees' wages, hours, or other terms and conditions of employment, without first affording notice and a meaningful opportunity to bargain to the union representing the employees. *NLRB v. Katz*, 369 U.S. 736 (1962); *United Cerebral Palsy of New York City*, 347 NLRB 603, 608 (2006).

The Board has long held that leave or attendance policies are mandatory subjects of bargaining. See, e.g., *Chino Valley Medical Center*, 363 NLRB No. 32, slip op. at 1 fn. 1 (2015); *Dorsey Trailers, Inc.,* 327 NLRB 835, 852 fn. 26 (1999), enfd. in relevant part 233 F.3d 831 (4th Cir. 2000); *Ciba-Geigy Pharmaceutical Division*, 264 NLRB 1013, 1016 (1982), enfd. 722 F.3d 1120 (3d Cir. 1983).

The Board also has long held that, absent compelling economic considerations, an employer acts at its peril in making changes in terms and conditions of employment during the period that objections to an election are pending and the final determination has not yet been made. Thus, where the final determination on the objections results in the certification of a representative, the employer is held to have violated Section 8(a)(5) and (1) for having made such unilateral changes. *Alta Vista Regional Hospital,* 357 NLRB 326, 327 (2011); *Mike O'Connor Chevrolet*, 209 NLRB 701, 703 (1974), enforcement denied on other grounds, 512 F.2d 684 (8th Cir. 1975) ("Such changes have the effect of bypassing, undercutting, and undermining the union's status as the statutory representative in the event a certification is issued."). Here, the Board on November 17, 2014, certified the Union as the collective-bargaining representative of unit employees, and the United States Court of Appeals for the District of Columbia upheld this determination on August 16, 2016. As noted, the Respondent's brief does not pursue the averment that the Union's certification was invalid.

Accordingly, the Respondent violated Section 8(a)(5) and (1) by announcing and changing its attendance policy in mid-October 2013, to wit, changing the points assessed for leaving early, without providing the Union with prior notice or an opportunity to bargain.

II. Should the General Counsel be permitted to amend the complaint to add the allegation that in mid-October 2013, the Respondent announced and implemented another undisputed unilateral change in attendance policy, i.e., reducing the num-

[11] GC Exh. 11.

[12] GC Exhs. 12, 13.

[13] GC Exhs. 14 (attendance notice), 15 (separation notice - discharge for violation of OHL attendance policy). In the attendance notice, the "T" (tardy) notations for the dates July 28 and October 10, 2014, were in error. Tr. 356 (Johnson).

[14] The original and amended charges all give the date of the unilateral change as May or June 2014.

ber of attendance points for which probationary employees could be terminated?

The original and amended charges all aver that the Respondent "unilaterally changed its attendance policy" and thus do not specify any particular provisions. On the second and last day of trial, the General Counsel, after presenting all of his witnesses and prior to resting his case, moved to amend the complaint to add the above as paragraph 7(a)(iii).

Amendments to a complaint before, during, or after a hearing are allowed "upon such terms as may be deemed just." Board's Rules, Section 102.17. Under this provision, a judge has wide discretion to grant or deny such motions. *Rogan Bros. Sanitation, Inc.,* 362 NLRB No. 61, slip op. at 3 fn. 8 (2015); *Bruce Packing Co.,* 357 NLRB 1084, 1084 at fn. 2 (2011), enforcement denied on point, 795 F.3d 18 (DC Cir. 2015).

Whether it is just to grant a motion to amend a complaint during a hearing is based on three factors: (1) whether there was surprise or lack of notice, (2) whether the General Counsel offered a valid excuse for its delay in moving to amend, and (3) whether the matter was fully litigated. *Remington Lodging & Hospitality, LLC,* 363 NRB No. 112, slip op. at 1 fn. 1 (2016) (motion made 2 days before the hearing closed); *Stagehands Referral Service, LLC*, 347 NRLB 1167, 1171 (2006), enfd. after remand, 315 Fed.Appx. 318 (4th Cir. 2009) (motion made at the end of the hearing); *Cab Associates*, 340 NLRB 1391, 1397 (2003) (motion made after all parties had rested their cases and during adjournment for the testimony of rebuttal witnesses).

The Respondent's Co-Counsel Bodzy objected to the amendment on the ground that the General Counsel was provided with GC Exhs. 6 and 7 (the 2011 and 2013 attendance policies) in early February 2016, and because the General Counsel previously advised him that the only unilateral change being alleged was the change in attendance points for leaving early. To support this representation, he proffered R. Exh. 19, a March 1, 2016 email string between him and the General Counsel. I rejected that exhibit at trial but, on further reflection, I reverse my ruling and admit it for the limited purpose for which it was offered.

The General Counsel responded that the Union had never seen the mid-October 2013 written policy prior to the hearing and that the General Counsel could not solicit an amended charge earlier.

However, even if the General Counsel did not meet with Brandon until the day of the trial, he could have discussed this with him before the trial opened and made a motion to amend at the outset and before any testimony was taken.

R. Exh. 19 is significant. Therein, the General Counsel notified Attorney Bodzy on March 1 that the Region had found merit to the allegations that "the Employer made an unlawful unilateral change concerning the attendance policy and discharged employee Jermaine Brown …." Bodzy asked, "What specifically is the alleged unilateral change to the attendance policy …?" In response, the General Counsel addressed only the change in attendance points to employees who leave work early, saying nothing about probationary employees. The record does not reflect that the General Counsel advised the Respondent's counsels at any time thereafter of any change in this position, prior to concluding the testimony of the General Counsel's witnesses.

I recognize that the undisputed change in policy on probationary employees was in writing and known to the Respondent. Nevertheless, this does not preclude the possibility that the Respondent's counsels might have had cross-examination for the General Counsel's witnesses on that particular subject, and might have had other witnesses and documents to present in defense had they been provided adequate notice of the General Counsel's intention to amend.

For the above reasons, I conclude that the General Counsel failed to meet any of the three pertinent factors described above, and I therefore deny the motion to amend. In light of this conclusion, I need not address the Respondent's argument (R. Br. at 20–21) that the amendment should be barred as untimely under Section 10(b) of the Act because no charge was ever filed concerning the change to the points required to terminate probationary employees.[15]

III. Was Brown discharged on July 1, 2015, because the Respondent relied on attendance points that he received as a result of the unilateral change in assessing leave early points?

The General Counsel alleges only the mid-October 2013 change in attendance points as a violation, regardless of any later additional unilateral changes. The basis for determining whether the Respondent's unilateral action harmed Brown has to be the policy before and after the mid-October 2013 change, not whether any later unilateral modifications of that change worked to his detriment.

There is no dispute that Brown committed all of the attendance infractions for which he was ultimately terminated. It is true that his discharge on July 1, 2015, was based in part on the imposition of four points for the two occasions that he left 1.45 hours early. However, the two points that he received for each violation did not represent increased points vis-à-vis the pre-mid-October 2013 policy, which would have assigned three points each. Rather, they represented an increase over the original mid-October 2013 revision to the attendance policy that resulted from the Respondent's later implementation of the 2-hour rule in place of a set one point for all leave early occurrences.

Thus, under either the original mid-October 2013 change, or the 2-hour rule into which it evolved, Brown benefitted in that he accrued the 13 points at a later time and thus delayed rather than hastened his discharge.

Accordingly, I cannot conclude that Brown's discharge was caused by any unilateral change in the Respondent's attendance policy and therefore recommend dismissal of this allegation.

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

[15] Although the Respondent's answer asserted a 10(b) bar to the allegations in the existing complaint, the Respondent's brief does not raise this defense, and I deem it withdrawn.

3. By the following conduct, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 2 (6) and (7) of the Act and violated Section 8(a)(5) and (1) of the Act: Unilaterally announced and changed the number of points assessed for employees leaving work early, in mid-October 2013, without first having afforded the Union notice and an opportunity to bargain.

REMEDY

Because the Respondent has engaged in unfair labor practices, it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

The Board's standard remedy in Section 8(a)(5) cases involving unilateral changes resulting to losses to employees is to make whole any employees affected by the change. *Grand Rapids Press,* 325 NLRB 915, 916 (1998), enfd. mem. 208 F.3d 214 (2000); *North Star Steel v. NLRB,* 974 F.2d 68, 70–71 (8th Cir. 1992), enfg. 305 NLRB 45 (1991). However, inasmuch as the unilateral change regarding points assessed for leaving work early benefitted, rather than harmed, unit employees, such a remedy is inapplicable.

On these findings of fact and conclusions of law, and on the entire record, I issue the following recommended[16]

ORDER

The Respondent, Osburne-Hessey Logistics, LLC, Memphis, Tennessee, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Unilaterally announcing and implementing changes in the number of attendance points assessed for employees leaving work early.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights Section 7 of the Act guarantees to them.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Before implementing any changes in wages, hours, or other terms and conditions of employment of unit employees, notify and, on request, bargain with the Union as the exclusive bargaining representative of employees in the following bargaining unit:

> All fulltime custodians, customer service representatives, senior customer service representatives, cycle counters, inventory specialists, maintenance, maintenance techs, material handlers, operators 1, operators 2, operators 3, quality assurance coordinators, returns clerks, and team leads employed at [its six Memphis, Tennessee facilities]; excluding all other employees, including office clerical and professional employees, guards, and supervisors as defined in the Act.

(b) Upon the Union's request, rescind the mid-October 2013 change in the number of attendance points assessed for employees leaving work early.

(c) Within 14 days after service by the Region, post at its facilities in Memphis, Tennessee, copies of the attached notice marked "Appendix."[17] Copies of the notice, on forms provided by the Regional Director for Region 15, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet set, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since October 14, 2013.

(d) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated, Washington, D.C. September 22, 2016

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

An employer subject to the National Labor Relations Act must collectively bargain with the labor organization that represents its employees concerning wages, hours, and working conditions.

United Steel, Paper and Forestry, Rubber, Manufacturing,

[16] If no exceptions are filed as provided by Section 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Section 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[17] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Energy, Allied Industrial and Service Workers a/k/a United Steelworkers Union (the Union), is the certified bargaining representative of a unit of our employees in the following unit:

> All fulltime custodians, customer service representatives, senior customer service representatives, cycle counters, inventory specialists, maintenance, maintenance techs, material handlers, operators 1, operators 2, operators 3, quality assurance coordinators, returns clerks, and team leads employed at our six Memphis, Tennessee facilities; excluding all other employees, including office clerical and professional employees, guards, and supervisors as defined in the Act.

WE WILL NOT announce or implement changes in the number of attendance points that you are assessed for leaving work early, without first giving the Union notice and an opportunity to bargain.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of your rights under Section 7 of the National Labor Relations Act, as set forth at the top of this notice.

WE WILL, before announcing or implementing any changes in wages, hours, or other terms and conditions of employment of unit employees, notify and, on request, bargain with the Union as the exclusive bargaining representative of employees in the above unit.

WE WILL, upon the Union's request, rescind the mid-October 2013 change that we made in the number of attendance points that you are assessed for leaving work early.

OZBURN-HESSEY LOGISTICS, LLC

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/15–CA–165554 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.